No. 95-210

Supreme Court, U.S.
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# In The Supreme Court Of The United States

OCTOBER TERM, 1995

**HOLLY FARMS CORPORATION;**
**TYSON FOODS, INCORPORATED,**
*Petitioners,*

**v.**

**NATIONAL LABOR RELATIONS BOARD,**
*Respondent,*
**and**

**CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391, 29, 71, 355, 592, 657, 988, AND ALL AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,**
*Intervenor.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does a purchaser of the stock of an ongoing corporation, solely by virtue of its stock ownership interest, become a successor under NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972), to the employing corporation's bargaining obligation with an existing union at the time of the stock purchase?

2. Does a parent corporation that makes a lawful economic decision to discontinue its unionized subsidiary's transportation methods and to integrate the subsidiary's transportation operations with the parent's much larger and fundamentally different nonunion transportation operations have a right under NLRB v.

Burns International Security Services, Inc., 406 U.S. 272 (1972), (a) to establish the initial terms and conditions on which employment in the newly integrated transportation division will be offered to the subsidiary's unionized employees and (b) to decline to recognize the union as the representative of the employees who were formerly employed by the subsidiary?

3. When an employer lawfully makes a fundamental managerial decision under First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), to discontinue the economically unprofitable transportation methods utilized in its unionized transportation operations and to integrate those operations and employees into



the employer's much larger and fundamentally different nonunion transportation operations, are the terms and conditions of employment in the newly merged operation part of the decision and not subject to mandatory bargaining? or are they merely part of the effects of the decision and a mandatory subject of bargaining?

4. If an employer integrates a subsidiary's unionized operation with its own much larger nonunion operation, may the National Labor Relations Board award reinstatement and back pay to employees of the subsidiary who willfully refuse to accept employment under the terms and conditions of employment in the larger merged operation?

5. Are chicken catchers, fork-lift drivers, and live-haul drivers of a vertically integrated poultry producer considered agricultural employees under Section 2(3) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 152(3) (1973)?



## Parties to the Proceeding

The parties before this Court are those set forth in the caption.[1]

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[1] Tyson Foods, Inc., is involved in a joint venture and/or partnership with Trasgo, S.A. DE C.V.; Offshore Systems, Inc.; Aleutian Fuel Services; Ucluelet Seafood Processors; Universal Plan Investments; and Shanghai Ocean Wealth Products Corporation. Tyson Foods, Inc., was the parent company of Holly Farms, Inc. There are no other parent companies or non-wholly-owned subsidiaries.

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## REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The National Labor Relations Board issued its order on May 28, 1993. Said order is reported at 311 N.L.R.B. 273 (1993). (A copy is reproduced in the appendix to this petition beginning at page A-79.) The United States Court of Appeals for the Fourth Circuit issued its decision on March 10, 1995. Said decision is reported at 48 F.3d 1360 (4th Cir. 1995). (A copy is reproduced in the appendix to this petition beginning at page A-1.) Petitioner's timely petition for rehearing was denied on May 9, 1995. (A copy of this order is reproduced in the appendix to this petition beginning at page A-936.)

## STATEMENT OF JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on March 10, 1995. A timely petition for rehearing was filed on April 14, 1995. On May 9, 1995, the court of appeals denied the petition for rehearing. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1993).

## RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set forth in the appendix at pages A-940-43. These provisions are 29 U.S.C. § 152(3) (1973), 29 U.S.C. § 157 (1973), 29 U.S.C. § 158(a) (1973), 29 U.S.C. § 159(a) (1973), and 29 U.S.C. § 203(f) (1978).

## STATEMENT OF CASE

For many years, Petitioner Holly Farms ("Holly") has been engaged in the production and marketing of poultry products at various facilities throughout the United States, including Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas. Its operations have included hatcheries, live- haul operations, feed mills, feed haul operations, maintenance facilities, processing plants, and transportation operations. (A-227-29.)

### A. The Transportation Operations

In early January 1989,[2] Chauffeurs, Teamsters and Helpers, Local

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[2] All dates are 1989 unless otherwise indicated.



Union Nos. 29, 71, 355, 391, 592, 657, and 988 (hereinafter collectively "the Union") filed a representation petition with the National Labor Relations Board ("NLRB" or "Board") seeking to represent the drivers and yardmen employed by Holly in its long haul transportation operations at Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas. The NLRB conducted a secret-ballot election, which resulted in the Union's being certified on March 24 as the collective bargaining representative for these transportation employees. (A-229, A-233.)

On April 11, Holly began negotiating with the Union for a collective

bargaining agreement to cover the long haul transportation employees. The parties stipulated that these negotiations were conducted in good faith. (A-236, A-597-98.)

While these negotiations were continuing, Petitioner Tyson Foods, Inc. ("Tyson"), was negotiating to purchase the stock of Holly. Tyson, like Holly, was engaged in the production and marketing of poultry products at various locations throughout the United States. Its operations included hatcheries, live-haul operations, feed mills, feed haul operations, maintenance facilities, processing plants, and transportation operations.

Although Tyson and Holly were engaged in similar businesses, the



transportation operations of the two companies were fundamentally different. Holly's long haul transportation operation existed primarily to deliver Holly products to Holly customers. The long haul operations at Holly operated on a cost basis and were largely controlled by the production schedule at their respective processing plants. (A-667-68.) Each plant maintained a dispatch office from which loads were assigned and trucks were dispatched. Drivers and their trucks were dispatched on a first-in, first-out basis, and an "extra board" was maintained from which additional drivers could be selected when needed to haul a load or team up with another driver to haul a load on a trip that would re-

quire a single driver to exceed his allotted drive time. (A-666, A-669-70.)

Although Holly tried to lower its transportation costs by securing backhaul business, it was largely unsuccessful. Approximately 50 percent of Holly's return miles were "deadhead," or empty, miles, resulting in an annual estimated loss of $5 million to $6 million. (A-73-74.)

Tyson's transportation operations were not represented by any union and were much larger than Holly's, consisting of approximately 550 drivers compared to Holly's 220 drivers. (A-666-67.) In contrast to Holly's transportation system, Tyson Transportation operated as an independent, profit-seeking enterprise.



Tyson hauled only 35 percent of Tyson's products, with the balance being hauled by common carriers, allowing Tyson to limit its hauling to areas where it had established backhaul customers, which created greater backhaul revenues. Tyson's empty mileage ratio was between 7.5 percent and 12 percent, and Tyson Transportation has generated a profit every year since 1980. (A-117-18, A-601, A-667.)

Unlike Holly, Tyson operated as a common carrier, and each trip made by a driver consisted of multiple legs in order to generate backhaul revenue. Whereas Holly drivers would typically be gone three to four days at a time, Tyson drivers were frequently gone for ten days to two

weeks at a time. Tyson's fleet manager concept enabled trucks to be coordinated through a central location rather than being dispatched from each plant. (A-117-18, A-669-83.)

On July 18, Tyson purchased the stock of Holly. When Tyson purchased Holly's stock, it made no immediate changes in Holly's transportation division. Holly continued to operate as a separately identifiable company. For two months after the acquisition, nothing changed for the Holly transportation employees, all of whom continued on the Holly payroll, under the same terms and conditions of employment. (A-101.) The parties stipulated that during this two-month period, Holly continued to engage in



meaningful negotiations with the Union for a contract. Agreements were reached on some additional issues, but no final contract was achieved. (A-94-99, A-598-628.)

On September 11, Tyson made a decision to discontinue the Holly methods of transportation, which were continuing to lose money, and to merge these operations with Tyson's transportation operations under the Tyson method of operations. It was further decided that all Holly transportation employees would be offered employment in the newly integrated operation under Tyson's established terms and conditions of employment. (A-617-18.)

On September 12, Holly informed the Union that its transportation

operations would cease to exist on September 22 and that Holly drivers would be receiving offers of employment with Tyson Transportation, to be effective on September 22. Holly declined to bargain over the integration decision, but offered to bargain over the effects of the integration. Holly, however, took the position that the Tyson terms and conditions of employment were part of the integration decision and not part of the effects of that decision. The Union rejected this offer. (A-97-99.)

Concurrent with the announcement to the Union, Holly notified all drivers that Tyson was taking over the transportation operation and advised the drivers that they were being offered jobs by Tyson. (A-99.)



The Union's attorney recommended that the employees accept Tyson's offer of employment. (A-779.) All but 47 of Holly's 220 transportation employees accepted employment with Tyson. These 47 drivers declined to accept employment under the Tyson terms and conditions of employment. (A-631-36.)

The integration required extensive changes to Holly's operations. Pursuant to the merger, the Interstate Commerce Commission operating authority of Holly was combined with that of Tyson and Holly's motor carrier number was discontinued. (A-681.) Tyson's fleet manager concept was implemented, and the use of plant-based dispatchers was discontinued. The Tyson computer system

was implemented for dispatching trip information, and the Tyson routing system was implemented. (A-670, A-674-75.)

The integration involved an immediate integration of drivers and product. Former Tyson drivers began delivering Holly product, and former Holly drivers began delivering Tyson product. (A-674, A-689-90.) The former Holly drivers began driving Tyson trip patterns, which involved 10 to 14 day trips. (A-680-82.)

A temporary terminal was established by October 1, and a permanent terminal location near the Wilkesboro airport was suitably renovated and occupied by early December. All hauling operations for the Monroe, Wilkesboro, Glen Allen, Harrisonburg,



and Temperanceville facilities have since been coordinated from the central Wilkesboro terminal in accordance with the Tyson fleet manager concept. (A-700-04.)

Tyson assumed control of all employment and labor relations policies that had previously been administered by Holly. (A-696.) Drivers began wearing Tyson uniforms and were subject to Tyson work rules and a Tyson safety program. (A-691-96.) The Tyson payroll system was implemented, and a Tyson Sperry Univac computer system was put in place at Wilkesboro. (A-705-07.)

Yard employees, who became unnecessary under the Tyson operating system, were assigned to other jobs in the processing plant and were

transferred to the plant payroll. (A-683-86.)

Based on its conclusion that the former Holly transportation bargaining unit had been destroyed by the integration, Tyson declined to recognize or bargain with the Union in the newly integrated transportation operation. On October 1, approximately 40 former Holly transportation employees who had accepted employment with Tyson established picket lines and went on strike to protest the changes made by Tyson and its failure to recognize the Union. (A-779-85.)

The Union filed unfair labor practice charges with the Board, and the Board subsequently issued a complaint alleging, inter alia, that Tyson became a successor to Holly's



bargaining obligation in the transportation unit at the time of the July 18 stock purchase, that Tyson unlawfully failed to bargain over the decision to integrate the two transportation operations and its effects, that Tyson unlawfully discharged the 47 drivers who had declined Tyson's offer of employment, that Tyson unlawfully withdrew recognition from the Union, and that the strike that began on October 1 was an unfair labor practice strike.

B. The Live-Haul Unit

The Union also conducted separate organizing efforts among the employees of Holly's live production department in Wilkesboro, North Carolina. A representation petition was filed with the Board on February 16.

(A-233.) Over the objection of Holly that the unit included agricultural employees not covered by the NLRA, 29 U.S.C. § 151, et seq., the Board approved an election in the following bargaining unit:

> All live-haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina and feed haul, feed mill and service center employees employed at the facility of the Respondents located in Roaring River, North Carolina, excluding all office employees, guards and supervisors as defined in the Act.

(A-211-12.)

On July 27 an election was held in which the Union failed to receive a majority of the valid votes cast. The Union filed unfair labor practice charges with the Board alleging that Holly violated the Act by various acts committed during the Union's



organizing activities. The Board subsequently issued a complaint alleging that Holly had committed various violations of the Act.

C. The NLRB Proceedings

The NLRB acquired jurisdiction under Sections 10(a) and (b) of the NLRA, 29 U.S.C. §§ 160(a) & (b) (1973). Pursuant to Section 10(c) of the Act, 29 U.S.C. § 160(c) (Supp. 1995), a hearing was held before Administrative Law Judge ("ALJ") Robert M. Schwarzbart beginning on November 27, 1989, and concluding on May 2, 1990.

The ALJ issued his decision on March 12, 1992. He concluded, inter alia, that Tyson became a successor to Holly's bargaining obligation on July 18; that Tyson unlawfully failed

to bargain over the decision to integrate the two transportation operations and its effects; that Tyson unlawfully unilaterally imposed its terms and conditions of employment on the former Holly drivers, thereby unlawfully constructively discharging the 47 drivers who rejected these terms; that Tyson unlawfully withdrew recognition from the Union; and that the strike of October 1 was an unfair labor practice strike. The ALJ also concluded that a bargaining order under NLRB v. Gissel Packing Co., 395 U.S. 575, reh'g denied, 396 U.S. 869 (1969), should be issued in the live-haul bargaining unit where the Union had lost an election. (A-206-935.)

Exceptions to the ALJ's decision were filed with the Board. On May



28, 1993, the Board issued its decision and order. The Board affirmed in part and reversed in part. The Board agreed with the ALJ that Tyson became a successor to Holly's bargaining obligation on July 18. (A-105-14.) The Board, however, concluded that the decision to integrate the two transportation divisions involved a fundamental change in scope and direction within the meaning of First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), which change Tyson had a right to make without bargaining with the Union. (A-115-21.) Nevertheless, the Board held that issues such as work locations, schedules, and pay systems were part of the effects of the decision rather than part of the decision

itself and that Tyson unlawfully imposed these matters on the Holly drivers. (A-121-124.)

The Board rejected the ALJ's conclusion that the 47 drivers who declined employment under Tyson's terms were constructively discharged. Instead, the Board held that these employees were actually discharged by Tyson. (A-125-26.) The Board agreed with the ALJ that Tyson unlawfully withdrew recognition from the Union (A-126-31) and that the strike of October 1 was an unfair labor practice strike. The Board also agreed that a Gissel bargaining order should issue in the live-haul unit. (A-134-56.)



D. The Court Of Appeals Proceedings

On June 7, 1993, Petitioners timely filed a petition for review with the United States Court of Appeals for the Fourth Circuit. On July 19, 1993, the Board filed a cross-application for enforcement of its order. The court of appeals acquired jurisdiction pursuant to Sections 10(e) and (f) of the Act, 29 U.S.C. §§ 160(e) & (f) (1973). These provisions specify no time in which a party must seek review of a Board order.

On March 10, 1995, a panel of the court of appeals enforced the Board's order. Judge Niemeyer dissented in part. Judge Niemeyer concluded that "the majority opinion significantly misconstrues the law of

successorship liability when it refuses to recognize the existence of two corporate entities for the two months after the stock purchase by Tyson." (A-55.)

Judge Niemeyer was of the opinion that because Holly's transportation operations continued unchanged for two months after Tyson acquired the stock of Holly, Tyson was not a successor to Holly's bargaining obligation at the time of the stock purchase. According to Judge Niemeyer, successorship principles did not come into play until September, when Tyson discontinued Holly's transportation methods and integrated the Holly transportation operations into the much larger Tyson transportation unit. Tyson's offer of employment



under Tyson's terms was lawful. Moreover, because the integration of the two transportation divisions had destroyed the former Holly bargaining unit, Tyson had no obligation to recognize and bargain with the Union. Thus Judge Niemeyer would have denied enforcement of these aspects of the Board's decision. (A-63-78.)

Judge Niemeyer also would have denied enforcement to the Gissel bargaining order in the live-haul unit. It was his opinion that the chicken catchers, forklift drivers, and live-haul drivers were agricultural employees exempt from coverage by Section 2(3) of the Act, 29 U.S.C. § 152(3) (1973). (A-57-61.)

Petitioners now file this Petition For Certiorari.

## REASONS FOR GRANTING THE WRIT

This case presents important issues regarding the application of the successorship doctrine, established by the Court in NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972), to stock acquisitions, parent-subsidiary relationships, and integration decisions. This specific issue has never been addressed by the Court. The Fourth Circuit's decision is inconsistent with the decisions of all other circuits that have considered the issue. "Because of the importance of the successorship issue in labor law, and because of [the Court's] interest in the rules developed by the Board for successorship cases," the Court should grant certiorari. Fall River



Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 36 (1987).

This case also presents an important issue regarding the scope of the Court's decision in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). In particular, where is the line drawn between a decision and its effects? The opinions of the Board and the court of appeals have emasculated Tyson's conceded right under First National Maintenance to make a decision to integrate the two transportation operations by characterizing certain fundamental aspects of the decision as part of the effects of the decision.

A third important issue raised by this petition concerns the Board's

authority to treat employees as discharged employees entitled to reinstatement and back pay when those employees voluntarily reject terms of employment that are later determined to be unlawfully imposed unilaterally. The decision of the Board and the court of appeals creates the anomalous result that employees who voluntarily reject unlawfully imposed conditions of employment are entitled to reinstatement and back pay from the date they reject the terms, while employees who strike over the very same terms are entitled to reinstatement and back pay only after they offer unconditionally to return to work under the same terms that were unlawfully imposed.



Finally, this case raises an issue of the scope of the agricultural exemption and its application to chicken catchers, forklift drivers, and live-haul drivers. The Fourth Circuit's decision is inconsistent with the Fifth Circuit's decision in Coleman v. Sanderson Farms, Inc., 629 F.2d 1077 (5th Cir. Unit A 1980), reh'g denied, 644 F.2d 34 (5th Cir. Unit A Apr. 1981), and the Ninth Circuit's decision in NLRB v. Victor Ryckebosch, Inc., 471 F.2d 20 (9th Cir. 1972).

A. The Fourth Circuit's Decision Is In Conflict With The Court's Decisions And The Decisions Of Other Courts Of Appeals Regarding Successorship.

The Fourth Circuit, with one judge dissenting, held that "[a]lthough the Supreme Court has yet to

decide the question, the policies behind the labor laws compel the finding that a new stockowner acquires the duty to bargain with an existing union at the time of a stock transfer." (A-21.) While it is true that the Court has not yet directly decided the issue, the Fourth Circuit's opinion is in conflict with the opinion of every other circuit court that has addressed the issue and is inconsistent with the principles of successorship developed by the Court.

In NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972), Wackenhut had provided security service for Lockheed for five years under a service agreement with Lockheed. Wackenhut's guards were



represented by a union and were covered by a collective bargaining agreement. Shortly after Wackenhut and the union entered into a collective bargaining agreement, Wackenhut's contract with Lockheed expired and a new contract was put up for bid. Burns was awarded the bid and replaced Wackenhut as Lockheed's security service. Burns began operations with 42 guards, 27 of whom were former Wackenhut guards. Burns declined to recognize either the union or the collective bargaining agreement.

The Court held that Burns had an obligation to recognize and bargain with the union inasmuch as "[i]n an election held but a few months before, the union had been designated

bargaining agent for the employees in the unit and a majority of these employees had been hired by Burns for work in the identical unit." 406 U.S. at 278. The Court was careful, however, to differentiate the following scenario: "It would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one." Id. at 280 (footnote omitted).

Although the Court held that Burns had an obligation to recognize and bargain with the union, it concluded that Burns had no obligation to adopt the collective bargaining



agreement in effect between Wackenhut and the Union. 406 U.S. at 287-88.

Finally, the Court held that Burns was free to impose its own initial terms and conditions of employment on the employees:

> It is difficult to understand how Burns could be said to have changed unilaterally any preexisting term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed its terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.

406 U.S. at 294 (emphasis in original).

Decisions of the Court subsequent to Burns have recognized that the Burns principles apply in other contexts, including "mergers, consolidations, and purchases of assets." Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 n.5 (1973); see Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) (assets purchase); Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974) (assets purchase).

The Court has never addressed the applicability of Burns to a stock purchase. Prior to the decision in this case, however, the courts of appeals that had considered the issue had uniformly held that a mere stock transfer, unaccompanied by any significant operational changes affect-



ing the bargaining unit employees, did not effectuate a change in the employer and thus did not trigger the application of Burns' successorship principles.

In NLRB v. Miller Trucking Service, Inc., 445 F.2d 927 (10th Cir. 1971), a case that predated Burns, Miller Trucking's owner sold all of his stock to Tulsa Crude Oil Purchasing Company. Miller Trucking, however, continued to operate in substantially the same manner as it had prior to the stock sale. At the time of the sale, the union had neither been certified by the Board nor recognized by the employer, and there was no collective bargaining agreement. Although it found no substantial evidence of unfair labor prac-

tices, the Tenth Circuit held that the stock transfer "did not change the corporate entity" and "[t]he employing entity at all times was Miller Trucking Service, Inc." 445 F.2d at 930.

In Miami Foundry Corp. v. NLRB, 682 F.2d 587 (6th Cir. 1982), Miami Foundry's employees had been represented by a union for 30 years, and a collective bargaining agreement was in effect. During the term of the agreement, 59 percent of Miami's stock was sold to A. C. Williams Company. One week prior to the stock sale, Miami terminated its employees without bargaining with the union, shut down its foundry, and closed its doors. Immediately after the stock sale, it reopened, but rehired only



six of its former employees, refused to honor the contract, and refused to recognize the union.

The Sixth Circuit did not discuss Burns, and it is clear that the court viewed successorship principles as being inapplicable to a mere stock transfer absent a finding "that the new company completely substituted for the old, and that the old was no longer in existence." 682 F.2d at 589. The court explained: "Miami never ceased as a business entity and its obligations under the 1977 agreement, therefore, never ceased." Id.

In UFCW, Local 152 v. NLRB, 768 F.2d 1463 (D.C. Cir. 1985), the union had represented certain employees of Spencer Foods for many years. Spencer and the union had been par-

ties to a series of collective bargaining agreements. Upon the expiration of the most recent collective bargaining agreement, Spencer closed the unionized plant and subsequently sold all of its stock to Land O' Lakes. Eighteen months after Spencer closed, it reopened under the ownership of Land O' Lakes. The court rejected the Board's conclusion that a successorship occurred when Spencer sold its stock to Land O' Lakes and reopened. In holding that Spencer (not Land O' Lakes) had a continuing obligation to recognize the union, the court explained:

> It is worth noting, at the outset, that in this case, the same corporate entity that existed prior to the Spencer plant closing did continue to exist after the reopening of the Spencer plant, notwithstanding the



> transfer in the ownership of the corporation's stock, and notwithstanding the changes in the corporation's status and business operations.

768 F.2d at 1471 (emphasis in original).

In Esmark, Inc. v. NLRB, 887 F.2d 739 (7th Cir. 1989), Swift's employees were represented by the union and were covered by a collective bargaining agreement. When the union refused to consider mid-term contractual modifications, Swift's stock, through a multitude of complicated transactions, was conveyed to Esmark, which in turn conveyed the stock to a subsidiary, New Sipco. New Sipco declined to recognize the union or the collective bargaining agreement and hired its own employees. The Seventh Circuit held that

the various transactions were nothing more than a stock sale, that there was no change in the employing entity, and that the successorship doctrine was "of no relevance." 887 F.2d at 751. Thus the employer had a continuing obligation to recognize both the union and the collective bargaining agreement.

Although the factual situations have varied significantly, the decisions of the Sixth, Seventh, Tenth, and District of Columbia Circuits described above are uniform in their espousal of the principle that a mere stock transfer, absent some accompanying substantial change in operations affecting the employees, does not make the new stockowner a successor to the existing employer's labor



obligations[3]. Those obligations remain with the existing employer. The decisions of these courts are consistent with the Court's holding that "[t]he insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception." NLRB v. Deena Artware, Inc., 361 U.S. 398, 402-03 (1960) (citation omitted).

It is undisputed in this case, and the Board found, that "for 2 months following the purchase, nothing changed for the former Holly Farms employees, all of whom were retained on the payroll under their

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[3] Prior to the decision in this case, the Fourth Circuit had also held that a mere change in stock ownership did not trigger application of successorship principles. EPE, Inc. v. NLRB, 845 F.2d 483 (4th Cir. 1988).

existing wages, hours, and terms and conditions of employment." (A-101.) Holly remained a viable corporate entity and continued to bargain in good faith with the Union. The Board's legal conclusion, enforced by the panel majority, that Tyson became a successor to Holly's bargaining obligation on July 18, when it acquired Holly's stock, is erroneous as a matter of law. See generally Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974) (continued viability of original employer with which union could deal was reason for finding no successorship).

As Judge Niemeyer recognized in his dissent from the panel's opinion, there can be no successorship unless



there is "a change of employer so that one supplants the other. Obviously, if the previous corporation continues in its existing form as the employer, no succession occurs." (A-65.)

Tyson is not suggesting that successorship principles never came into play. In September, when Tyson discontinued the Holly transportation methods and integrated the two transportation operations, Holly disappeared as the employer of the drivers and yardmen and Tyson became their employer. Tyson, as a new employer, had a right under Burns to establish its own terms and conditions of employment.[4] Thus its offer

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[4] The Board's conclusion that Tyson became a successor on July 18, at the time of (continued...)

of employment to Holly drivers under Tyson's terms was not a unilateral change.

Moreover, the integration completely changed the manner in which Holly and its employees had previously operated. The Holly employees were integrated into the much larger Tyson unit and lost any separate identity. Thus Tyson did not acquire any bargaining obligation with the Union.

Tyson and Holly respectfully request that the Court grant this petition and that it resolve the conflict among the circuits on this im-

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[4](...continued)
the stock purchase, appears to be a result-oriented conclusion designed to find Tyson's imposition of its own terms and conditions of employment unlawful. A successor must make any desired changes in terms and conditions of employment at the time of hiring or else it loses that right.



portant question of federal labor law.[5]

B. The Fourth Circuit's Decision Is Inconsistent With First National Maintenance.

In First National Maintenance Corp. v. NLRB, 452 U.S. 666, 677 (1981), the Court held that an employer has a right to make a decision to close down a particular operation without bargaining with the union that represented its employees because the decision involved "a change in the scope and direction of the enterprise" and was "'not in [itself] primarily about conditions of employment . . . .'" Citation omitted. The Court emphasized that "Congress

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[5] It is also highly significant to Petitioners inasmuch as their liability has been estimated publicly by the Union to exceed $10 million.

had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed." 452 U.S. at 676.

In First National Maintenance, the Court distinguished between decision bargaining and effects bargaining. Although the employer had no duty to bargain over the partial closing decision, it had a duty to bargain over the effects of that decision. 452 U.S. at 677 n.15, 681-82.

This case raises the important issue, never directly addressed by the Court, as to where the line is drawn between a decision and its effects. The Board held that Tyson's



decision to integrate the two transportation operations involved a fundamental change in the scope and direction of the business and was one over which there was no duty to bargain. The Board explained:

> [T]he integration process involved structural and operational changes designed to make the former Holly Farms transportation division operate like a common carrier. Additionally, implementation of the integration decision required the expenditure of capital. For these reasons, we find that the burden on the conduct of the business outweighs any benefit that might be gained from the Unions' participation in the decision and, therefore, that the September 12 integration decision was not a mandatory subject of bargaining.

(A-119-20 (footnotes omitted).) The Board noted that the structural and operational changes included requir-

ing "the former Holly Farms drivers, who had previously followed established routes, . . . to make multiple-leg trips in order to generate backhaul revenue." The capital expenditures included building new central terminals. (A-120.)

Although it concluded that Tyson had a right to make the decision to integrate, the Board held that Tyson was obligated to bargain over the effects. Tyson agrees that it had a duty to bargain over the effects, and it offered to do so. However, the Board's view of the effects of the decision is so broad that it eviscerates the decision itself.

According to the Board, the effects of the decision included "pay, work locations, schedules, and other



terms of employment resulting from the integration." (A-131.) Thus although building new central terminals was one of the capital investments relied upon by the Board to find no duty to bargain over the decision, the Board concluded that Tyson had a duty to bargain over work locations. Although requiring drivers to make multiple-leg routes was a fundamental operational change, the Board asserts that Tyson had a duty to bargain over schedules.

The Fourth Circuit panel and the Board adopted an "inevitable consequences" standard. (A-33, A-122.) Under that standard, any subject that is not an inevitable consequence of the decision is part of the effects. Tyson contends that this standard is

inconsistent with First National Maintenance and effectively emasculates Tyson's acknowledged right to make the integration decision.

The decision to integrate the two transportation operations was much more than a simple combination of two groups of employees. Tyson completely abandoned the Holly method of transportation and all policies and practices associated with it in favor of Tyson's method of transportation and all the policies and practices associated with it. Characterizing Tyson's transportation methods, policies, and practices as mere effects of the integration decision fails to acknowledge the breadth and scope of that decision.



The inevitable consequences standard is far too high. There is very little that can be characterized as inevitable. If an employer closes one facility that operates on 8-hour shifts and transfers the work to a second facility that operates on 12-hour shifts, it would not be inevitable that employees offered employment at the second facility would have to work 12-hour shifts. Presumably, it would be possible to have some employees working 12-hour shifts and others working 8-hour shifts. While such a scenario might be possible, it certainly would not be practical.

Whatever the scope of effects bargaining may be, it certainly does not extend to the very things that constitute the fundamental change in

scope and direction. Although the Court did not define the scope of effects bargaining in First National Maintenance, it did note that effects bargaining would include bargaining over "matters of job security." 452 U.S. at 681. Undoubtedly, effects bargaining includes bargaining over severance pay, supplemental unemployment benefits, and the right to transfer elsewhere with the employer. It should not, however, include bargaining over the terms and conditions of employment that apply after an employee accepts a transfer elsewhere.

Tyson respectfully requests that the Court grant certiorari to define the scope of effects bargaining.



C. The Board May Not Award Reinstatement And Back Pay To Employees Who Willfully Reject Employment.

The Board concluded that the 47 drivers who voluntarily rejected Tyson's offer of employment because the terms were different from those that existed at Holly were unlawfully discharged under Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1973), and were entitled to reinstatement and back pay. (A-125-26.) Assuming, arguendo, that Tyson unlawfully unilaterally changed terms and conditions of employment, the Act does not permit employees to willfully reject such terms and later be entitled to reinstatement and back pay.

The Board's conclusion that employees who voluntarily reject em-

ployment because certain terms of employment have been unlawfully imposed are discharged employees entitled to reinstatement and back pay undermines the Act's structured method of dispute resolution. Under the Act, employees who believe that their employer has engaged in an unfair labor practice have two options. One is to file an unfair labor practice charge with the Board. The Board investigates and, if the charge has merit, seeks an appropriate remedy through the Act's remedial provisions. A second option is to engage in a strike in an effort to bring economic pressure upon the employer to correct its actions. Section 7 of the Act specifically protects employees who engage in con-



certed activity for mutual aid or protection. 29 U.S.C. § 157 (1973).

Frequently employees and unions choose both options. They file unfair labor practice charges with the Board and simultaneously strike the employer. Unfair labor practice strikers, however, do not draw back pay from the date the strike began. They are entitled to back pay only <u>after</u> they make an unconditional offer to return to work and the employer refuses to reinstate them. Moreover, unfair labor practice strikers are entitled to reinstatement only if they offer to return to work under the terms and conditions imposed by the employer even though those terms were unlawfully imposed. They are not free to condition their

return on the employer's willingness to alter the terms of employment. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278, reh'g denied, 351 U.S. 980 (1956); Lapham-Hickey Steel Corp. v. NLRB, 904 F.2d 1180, 1187 (7th Cir. 1990).

In this case, the Board has given the 47 employees who rejected Tyson's offer of employment the right to dictate the terms of their employment. The Board's order requires that they be reinstated with full back pay from the date on which they rejected Tyson's offer of employment. The unfair labor practice strikers, however, had not made an unconditional offer to return to work as of the date of the hearing. Thus the Board's order requires Tyson to re-



instate them merely upon their unconditional offer to return to work.

This dichotomy between the unfair labor practice strikers and the employees who rejected employment is illogical. It is also contrary to labor law jurisprudence, which has historically recognized the principle of work now, grieve later. Indeed, the Board has recently observed that "it seems ill advised as a matter of policy to encourage employees to quit their jobs whenever they suffer any unlawful condition, at least if they have avenues for remedying that condition." Lively Elec. Inc., 316 N.L.R.B. No. 87, 148 L.R.R.M. (BNA) 1209, 1211 (1995) (emphasis in original).

Petitioners request that the Court grant certiorari to address this important issue.

D. The Fourth Circuit's Decision Regarding The Status Of Chicken Catchers, Forklift Drivers, And Live-Haul Drivers Is Inconsistent With The Legislative History Of The Agricultural Exemption And With Decisions Of Other Circuits.

The Fourth Circuit, with one judge dissenting, enforced the Board's order imposing a Gissel bargaining order in a unit that included Holly's chicken catchers, forklift drivers, and live-haul drivers. Holly's contention that these employees were agricultural employees excluded from coverage by Section 2(3) of the Act, 29 U.S.C. § 152(3) (1973), was rejected.

In Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298, 300 n.6 (1977),



the Court noted that "[a]nnually since 1946, Congress, in riders to the Appropriations Acts for the Board, has tied the definition of 'agricultural laborer' in § 2(3) of the NLRA to § 3(f) of the [Fair Labor Standards Act]." These riders preclude the Board from making any orders concerning bargaining units composed of agricultural laborers.

The Fourth Circuit's decision is directly contrary to the decision of the Fifth Circuit in Coleman v. Sanderson Farms, Inc., 629 F.2d 1077 (5th Cir. Unit A 1980), reh'g denied, 644 F.2d 34 (5th Cir. Unit A Apr. 1981). In Coleman, the court addressed the agricultural status of live-haul drivers and loader operators (forklift drivers) of a verti-

cally integrated poultry processor. The Coleman court rejected the contention that the Court's decision in Bayside precluded a finding of agricultural status and held that the live-haul drivers and loader operators were engaged in agriculture. 629 F.2d at 1081.

The Ninth Circuit has similarly held that live-haul drivers are agricultural employees. NLRB v. Victor Ryckebosch, Inc., 471 F.2d 20 (9th Cir. 1972). Although the Bayside Court cited Ryckebosch as a case involving an "apparent conflict" with Bayside, 429 U.S. at 299 & n.4, Bayside dealt with feedmill drivers, not live-haul drivers. Whereas feed is not an agricultural product, live chickens clearly are. Bayside does



not overrule the Ryckebosch holding with regard to live-haul drivers.

The Eighth Circuit, on the other hand, has held that live-haul drivers are not agricultural employees. NLRB v. Hudson Farms, Inc., 681 F.2d 1105 (8th Cir.) (per curiam), cert. denied, 459 U.S. 1069 (1982); Valmac Indus., Inc. v. NLRB, 599 F.2d 246 (8th Cir. 1979).

Petitioners request that the Court resolve the conflict among the circuits on the agricultural status of live-haul drivers and forklift drivers. Certiorari should also be granted on the status of the chicken catchers (as well as the forklift drivers), because their work is performed exclusively "on a farm" in conjunction with the farming activi-

ties on that farm. Section 3(f) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(f) (1978). The decisions of the Court, as well as pertinent legislative history, make it clear that all such individuals are agricultural employees. See Maneja v. Waialua Agric. Co., 349 U.S. 254 (1955).

Indeed, Congress added the words "or on a farm" to the FLSA's definition of "agriculture" specifically for the purpose of ensuring that the exemption would include the activities of a nonfarmer that are performed on a farm and that are incidental to the farming operations occurring on that farm. See Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 767 & n.16, reh'gs de-



nied, 338 U.S. 839 (1949) (discussing legislative history).

The proponent of this particular amendment, Senator George McGill stated that the purpose was to exempt "all work done on a farm, so long as it is incidental to agricultural purposes," as well as to exempt "all labor performed in making delivery to market." 81 Cong. Rec. 7888.

Senator McGill's amendment was approved (id.) and was included in the final version of the bill.

It is undisputed that the chicken catchers work on the farms of the independent growers. Nor can there be any doubt that catching chickens is a function that is as incidental to agricultural purposes as is thrashing wheat.

Holly's chicken catchers, fork-lift drivers, and live-haul drivers clearly come within the scope of the agricultural exemption. Petitioners request that the Court grant certiorari on this important issue.

Dated: Greensboro, North Carolina, August 3rd, 1995.

Respectfully submitted,

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